

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Micky Cutajar,

Plaintiff,

-against-

Commissioner of Social Security,

Defendant.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
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DATE FILED: 5/25/2020

1:19-cv-05569 (SDA)

ORDER

STEWART D. AARON, United States Magistrate Judge:

WHEREAS, on March 26, 2020, Plaintiff filed a motion for attorney fees pursuant to the Equal Access to Justice Act (“EAJA”) (Mot. for Atty. Fees, ECF No. 17); and

WHEREAS, in support of his motion, Plaintiff submitted an “Attorney’s Affirmation” that is not sworn and that has attached to it various exhibits (Olinsky Aff., ECF No. 18); and

WHEREAS, Defendant opposes Plaintiff’s motion, in part, on the basis that “plaintiff has failed to support his fee request with a sworn affidavit or declaration under penalty of perjury” (Opp. Mem., ECF No. 23, at 1); and


WHEREAS, unsworn statements by an attorney do not constitute admissible evidence, *see Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009); and

WHEREAS, in determining Plaintiff’s motion, this Court only will consider admissible evidence, *see Garcia v. Comprehensive Ctr., LLC*, No. 17-CV-08970 (JPO) (BCM), 2019 WL 8274296, at *2 (S.D.N.Y. Nov. 21, 2019), *report and recommendation adopted*, 2020 WL 1435002 (S.D.N.Y. Mar. 24, 2020) (requiring attorney fee application to be based upon admissible evidence).

IT IS HEREBY ORDERED THAT, if Plaintiff wishes the Court to consider the contents of the Attorney Affirmation, and its exhibits, as admissible evidence in support of his motion for attorney fees, then **no later than June 2, 2020**, he shall file an amended affirmation (or affidavit) that is sworn to under penalty of perjury. If timely submitted pursuant to the provisions of this Order, Plaintiff's amended affirmation (or affidavit) shall be deemed to have been filed on March 26, 2020. *See Scarborough v. Principi*, 541 U.S. 401, 418 (2004) (applying relation-back doctrine to amended EAJA application).

SO ORDERED.

DATED: New York, New York
May 25, 2020

A handwritten signature in black ink, reading "Stewart D. Aaron", is positioned above a horizontal line.

STEWART D. AARON
United States Magistrate Judge